Raja Petra bin Raja Kamarudin v Menteri Dalam Negeri

FEDERAL COURT (PUTRAJAYA) — CRIMINAL APPLICATION NO 07–1 OF 2009(B)
ALAUDDIN PCA, ARIFIN ZAKARIA CJ (MALAYA) AND RICHARD MALANJUM CJ (SABAH AND SARAWAK)
9 JUNE 2009

Constitutional Law — Courts — Federal Court — Three-member panel of Federal Court granted party adjournment to file application to recuse member of panel — Judge against whom recusal was directed did not sit on panel when formal recusal application was heard — Remaining two members of panel heard and dismissed application and then invited judge against whom recusal was directed to resume seat on panel — Whether decisions made by two-member panel were invalid for lack of quorum — Whether two-member panel wrong to take view that s 78(1) of the CJA applied to enable them to hear and determine recusal application in absence of third judge — Whether mere fact three-member panel had granted adjournment for recusal application to be filed did not mean hearing of the substantive matter had begun for s 78(1) to apply — Whether all decisions taken by two-member panel and thereafter by three-member panel were invalid and had to be set aside — Courts of Judicature Act 1964 ('the CJA') s 74(1)

At the outset of the hearing of an appeal and a cross-appeal before the Federal Court in the instant case, one of the parties ('Raja Petra') sought an adjournment to file a formal application to recuse one of the three members of the panel on the ground of bias. The panel granted the adjournment. When the formal recusal application came up for hearing, the member against whom the recusal was directed, ie, Augustine Paul FCJ, did not join his colleagues to hear the application. The remaining two members of the panel heard the application and dismissed it despite objections from Raja Petra that they could not do so since s 74(1) of the Courts of Judicature Act 1964 ('the CJA') required a minimum of three judges to hear and dispose of any matter. The two-member panel, however, summarily dismissed Raja Petra's objections by taking the view that since the 'proceedings' commenced when the full three-member panel had granted Raja Petra the adjournment he wanted, s 78(1) of the CJA empowered the remaining members of the panel to hear and determine the application in the absence of Augustine Paul FCJ. After the recusal application was dismissed, the two-member panel invited Augustine Paul FCJ to join them in the panel after which the full panel proceeded to hear and dismiss three other applications by Raja Petra. In the instant application made under s 137 of the Rules of the Federal Court 1995, Raja Petra sought a review of the decision of the two-member panel as well as the subsequent decisions made by the three-member panel. The grounds for the review application were, inter alia,

that: (a) the failure to observe the quorum required by s 74(1) of the CJA rendered the two-member panel's sitting and decisions unlawful and unconstitutional and s 78(1) did not apply in the circumstances; and (b) all decisions made by the three-member panel following the dismissal of the recusal application were flawed.

Held, allowing the review application and setting aside the two-member panel's decisions to dismiss the recusal application and to invite Augustine Paul FCJ to resume his seat on the panel:

(1) Although the three-member panel exercised its discretion to grant Raja Petra an adjournment to file the recusal application, the mere consideration of an application for an adjournment could not be said to have set the substantive matter in motion. It was not tenable to say the hearing had commenced just because an application for adjournment was made and allowed. When the adjournment was allowed, the proceeding had not come to a stage where the 'hearing had commenced and proceeded to such an extent that it was inconvenient to have it reheard'. The circumstances did not justify the invocation of s 78(1) of the CJA (see paras 20 & 24–25).

(2) There was a quorum failure. When the two-member panel proceeded to hear the recusal application, s 74(1) of the CJA was offended. The decision to dismiss the recusal application and the order to invite Augustine Paul FCJ to re-take his seat on the panel had to be set aside. It followed that the other decisions and orders in relation to encls 12(a), 13(a) and 21(a) made subsequent to the impugned decision and order also had to be set aside (see paras 26–27 & 29).

[Bahasa Malaysia summary

Pada permulaan pendengaran rayuan dan rayuan balas di hadapan Mahkamah Persekutuan dalam kes ini, salah seorang daripada pihak-pihak ('Raja Petra') memohon penangguhan untuk memfailkan permohonan rasmi untuk salah seorang daripada tiga ahli panel mengundur diri atas alasan berat sebelah. Apabila permohonan mengundur diri yang rasmi bangkit untuk pendengaran, ahli yang mana pengunduran diri diarahkan, iaitu Augustine Paul HMP, tidak menyertai rakan sekerjanya untuk mendengar permohonan tersebut. Dua ahli panel yang tinggal mendengar permohonan dan menolaknya meskipun bantahan daripada Raja Petra bahawa mereka tidak dapat berbuat sedemikian memandangkan s 74(1) Akta Mahkamah Kehakiman 1964 ('AMK') memerlukan minimum tiga hakim untuk mendengar dan menentukan apa-apa perkara. Dua ahli panel, walau bagaimanapun, secara ringkas menolak bantahan Raja Petra dengan berpandangan bahawa memandangkan 'proceedings' bermula apabila kesemua ketiga-tiga ahli panel telah memberikan kepada Raja Petra penangguhan yang dikehendakinya, s 78(1) AMK memberi kuasa kepada ahli yang tinggal untuk mendengar dan

menentukan permohonan dalam ketidakhadiran Augustine Paul HMP. Selepas permohonan mengundurkan diri ditolak, dua ahli panel menjemput Augustine Paul HMP untuk menyertai mereka dalam panel tersebut selepas mana panel penuh terus mendengar dan menolak tiga permohonan lain oleh Raja Petra. Dalam permohonan ini yang dibuat di bawah s 137 Kaedah-Kaedah Mahkamah Persekutuan 1995, Raja Petra memohon semakan keputusan dua ahli panel dan juga keputusan kemudiannya yang dibuat oleh tiga ahli panel. Alasan untuk permohonan semakan adalah, antara lain, bahawa: (a) kegagalan untuk memerhati korum yang dikehendaki oleh s 74(1) AMK membuatkan pendengaran dan keputusan dua ahli panel tak sah dan tidak berperlembagaan dan s 78(1) tidak terpakai dalam keadaan ini: dan (b) kesemua keputusan yang dibuat oleh tiga ahli panel berikutan penolakan permohonan untuk mengundur diri adalah cacat.

Diputuskan, membenarkan permohonan semakan dan mengetepikan keputusan dua ahli panel untuk menolak permohonan untuk mengundur diri dan untuk menjemput Augustine Paul HMP untuk mengambil tempatnya semula sebagai panel:

(1) Walaupun tiga ahli panel menjalankan budi bicaranya bagi memberikan kepada Raja Petra penangguhan untuk memfailkan permohonan untuk mengundurkan diri, pertimbangan semata-semata terhadap permohonan untuk penangguhan tidak boleh dikatakan untuk membuatkan perkara substantif bermula. Ia tidak dapat dipertahankan untuk menyatakan pendengaran tersebut bermula hanya kerana permohonan untuk penangguhan dibuat dan dibenarkan. Apabila penangguhan dibenarkan, prosiding tidak sampai kepada peringkat di mana 'hearing had commenced and proceeded to such an extent that it was inconvenient to have it reheard'. Keadaan tidak menjustifikasikan pembangkitan s 78(1) AMK (lihat perenggan 20 & 24–25).

(2) Terdapat kegagalan korum. Apabila dua ahli panel meneruskan untuk mendengar permohonan untuk mengundurkan diri tersebut, s 74(1) AMK adalah dicabuli. Keputusan untuk menolak permohonan untuk mengundurkan diri dan perintah untuk menjemput Augustine Paul HMP untuk mengambil semula tempatnya sebagai panel perlu diketepikan. Oleh itu keputusan lain dan perintah-perintah berkaitan kepada lampiran 12(a), 13(a) dan 21(a) yang dibuat selepas keputusan dan perintah yang dipersoalkan perlu diketepikan (lihat perenggan 26–27 & 29).]

Notes

For cases on Federal Court, see 3(2) *Mallal's Digest* (5th Ed, 2018 Reissue) paras 2650–2661.

Cases referred to

Asean Security Paper Mills Sdn Bhd lwn Mitsui Sumitomo Insurance (Malaysia) Bhd [2008] 2 MLJ 137; [2008] 6 CLJ 1, FC (refd)
Chia Yan Tek & Anor v Ng Swee Kiat & Anor [2001] 4 MLJ 1; [2001] 4 CLJ 61, FC (folld)
Savrimuthu v Public Prosecutor [1987] 2 MLJ 173; [1987] 1 CLJ 368; [1987] CLJ (Rep) 322, SC (refd)
Wan Khairani bte Wan Mahmood v Ismail bin Mohamad & Anor [2007] 4 MLJ 409; [2007] 4 CLJ 28, CA (folld)

Legislation referred to

Courts of Judicature Act 1964 ss 38(1), 42(1), 74(1), 78, 78(1)
Rules of the Federal Court 1995 r 137

Malik Imtiaz Sarwar (Azhar Azizan Harun, Ashok Kandiah, J Chandra and Neoh Hor Kee with him) (Matthews Hun Kandiah) for the appellant.
Tun Majid Tun Hamzah (Deputy Public Prosecutor) (Abdul Wahab Mohamed and Najib Zakaria with him) (SSFC) for the respondent.

Richard Malanjum CJ (Sabah and Sarawak) (delivering judgment of the court):

[1] Before us is an application by Raja Petra bin Kamarudin (Raja Petra) pursuant to r 137 of the Rules of the Federal Court 1995 ('the RFC').

[2] It is connected to the pending appeal by the Minister of Home Affairs (Criminal Appeal No 05–130 of 2008(B) and the cross-appeal by Raja Petra (Criminal Appeal No 05–143 of 2008).

[3] The hearing of the appeal and cross-appeal came before a three-member panel consisting of Nik Hashim, Augustine Paul and Zulkefli FCJJ on 11 February 2009.

[4] At the outset of the hearing learned counsel for Raja Petra applied to recuse Augustine Paul FCJ. Basically the ground relied on was that there might be a real danger of bias on the part of the learned judge since Raja Petra was critical of him in his website in 2001. It was also submitted that the judge had dismissed the habeas corpus application of Raja Petra in 2001 which was subsequently allowed by the Federal Court.

[5] A short adjournment was therefore applied to enable the filing of a formal application on the recusal. Initially the panel was inclined to dismiss the application for adjournment. However, on further consideration an adjournment was allowed on condition that Raja Petra had to file his

application the following day, 12 February 2009.

[6] When the formal application on recusal came up for hearing on 17 February 2009 Augustine Paul FCJ voluntarily requested to be excused from hearing it. The reason was based on the principle that justice must not only be done but also must be seen to be done.

[7] The remaining members, consisting of two-member panel, then proceeded to hear the application despite the objection by learned counsel for Raja Petra that it would be unconstitutional to do so.

[8] The objection was summarily dismissed on the ground that they were constitutionally empowered to continue the hearing by virtue of s 78 of the Courts of Judicature Act 1964 ('the CJA'). Principally the two-member panel in their judgment dated 9 April 2009 and forwarded to us on 27 April 2009 took the position:

(a) that the proceeding had already commenced on 11 February 2009 in which Augustine Paul FCJ participated in the exercise of discretion in allowing the application for adjournment by Raja Petra to enable him to file the formal application on recusal; and

(b) that the provision of s 78 of the CJA applied. The phrase 'illness or any other cause' does not attract the *ejusdem generis* principle. The word 'illness' does not create a genus so as to limit the general words 'any other cause' to 'causes of the same kind as illness which preceded it'. As such the temporary absence of Augustine Paul FCJ to attend the proceeding for the stated reasons would be permissible under the words 'any other cause' in the section.

[9] On the recusal application itself, the two-member panel dismissed it after considering the arguments submitted. In their judgment the two-member panel was of the view that the basis of making the application, namely, 'there be a real danger of bias' was 'far-fetched and ludicrous' because:

(a) it was Raja Petra who was critical to Augustine Paul FCJ to begin with in 2001 in his website;

(b) there was no response from Augustine Paul FCJ against the criticism nor any contempt proceeding taken against Raja Petra for the criticism; and

(c) as for the dismissal of the application for habeas corpus by Raja Petra by Augustine Paul FCJ it was held that a judge 'is not precluded from hearing a case against a person when he had in the past heard another case against the person if the facts in the cases are different'. It was also observed that in the previous habeas corpus application by Raja Petra the judge did not 'go into the facts of the case as it was agreed by the parties

in that case that the decision in one case that was being heard shall be binding' on the application by Raja Petra.

[10] Upon dismissal of the application the two-member panel invited back Augustine Paul FCJ to take his seat on the bench. Three applications by Raja Petra were then heard and dismissed by the three-member panel, namely:

(a) an application to have a quorum of five or seven judges to hear the appeal and cross-appeal;

(b) an application for leave to adduce further evidence, that is, 'evidence of the state of affairs' since his release; and

(c) an application for leave to adduce further evidence, that is, evidence of admissions by investigating officer pertaining to matters as the basis of the Minister's discretion.

[11] Raja Petra is now seeking for the review of the decision of the two-member panel as well as the subsequent decisions of the three-member panel.

[12] As against the decision of the two-member panel the application for review is premised on the following:

(a) that there was a quorum failure. The circumstances did not warrant the invocation of s 78(1) of the CJA. The sitting was therefore unlawful and unconstitutional; and

(b) apparent bias of the two-member panel.

[13] As against the subsequent decisions of the three-member panel the basis of applying for the review are:

(a) the decisions were contaminated 'by the flawed decision' for not recusing Augustine Paul FCJ. The right to a 'fair and impartial hearing was compromised by the involvement' of Augustine Paul FCJ; and

(b) the decisions in respect of applications for leave to adduce further evidence 'were contaminated by apparent bias'.

[14] In order for this present application to succeed, being made pursuant to r 137, the established threshold as propounded by this court in several of its decisions must be satisfied.

[15] Whilst declaring that this court has the inherent jurisdiction to review its own decision in order to prevent miscarriage of justice, it is also clearly spelt out that such exercise must be carried out sparingly and only in exceptional

A cases. In no case the jurisdiction should be abused. Further, under 'no circumstances should the court position itself as if it were hearing an appeal and decide the case as such. In other words, it is not for the court to consider whether this court had or had not made a correct decision on the facts. That is a matter of opinion. Even on the issue of law, it is not for this court to B determine whether this court had earlier, in the same case, interpreted or applied the law correctly or not. That too is a matter of opinion' per Abdul Hamid Mohamad CJ (as he then was) in *Asean Security Paper Mills Sdn Bhd lwn Mitsui Sumitomo Insurance (Malaysia) Bhd* [2008] 2 MLJ 137; [2008] 6 CLJ 1.

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[16] Although this court has taken a very cautious approach when dealing with an application under r 137 it has also been made plain that its earlier decisions are merely instances. Emphasis was made that 'it is not wise to even attempt to list out the other instances where this court should exercise such D discretion. It is best to leave the question open and decide the applications as they come before this court' per Zaki Tun Azmi PCA (as he then was) in *Asean Security Paper Mills Sdn Bhd lwn Mitsui Sumitomo Insurance (Malaysia) Bhd.*

[17] One instance where this court invoked r 137 was due to quorum failure. E It was held that the court was not duly constituted when it rendered its judgment. It occurred when there was only one remaining judge on the date of pronouncement of the judgment. The two others had retired although they had signed on the judgment earlier (see *Chia Yan Tek & Anor v Ng Swee Kiat & Anor* [2001] 4 MLJ 1).

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[18] In the present case the two-member panel considered the application for the recusal of Augustine Paul FCJ. Ordinarily such sitting is contrary to s 74(1) of the CJA which stipulates that 'every proceeding in the Federal Court shall be heard and disposed of by three judges or such greater uneven number G of judges as the Chief Justice may in any particular case determine'.

[19] However for the reasons given in their judgment as indicated above the two-member panel ruled that they could continue with the hearing.

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[20] With respect we do not think it is tenable to say that the hearing had commenced just because an application for adjournment was made and allowed.

I **[21]** Indeed a similar situation arose in the case of *Wan Khairani bte Wan Mahmood v Ismail bin Mohamad & Anor* [2007] 4 MLJ 409 before the Court of Appeal in which Augustine Paul JCA (as he then was) addressed the issue. No doubt it was a dissenting judgment. However, the issue was not a determinative point in the majority judgment. Thus, we think it is appropriate

in this case to consider the reasoning given in the dissenting judgment when addressing the issue. Moreover the provisions in the CJA discussed by the learned judge are in pari materia with the statutory provisions relevant in this case.

[22] In addressing the issue this is what the learned judge had to say (at pp 45–46):

> The section (section 42(1) of the CJA) is applicable when a judge is unable to exercise his functions through illness or any other cause in the course of a proceeding or in the case of a reserved judgment. There is no question of there being a reserved judgment in this case. So this is a case of a judge becoming unable to exercise his functions in the course of a proceeding. *The phrase '... in the course of a proceeding ...' in s 42(1) of the CJA is a reference to a proceeding that has already commenced. What requires consideration is the stage to which the proceeding must have moved before resort can be had to s 42(1) of the CJA to enable the remaining judges to continue with the proceeding. It must be remembered that the object of the section is to prevent the inconvenience of a rehearing of a proceeding to the parties when a member of the panel hearing it is unable to continue to do so. This will certainly not include a proceeding which has been merely called up for hearing. The phrase '... in the course of a proceeding'. must therefore refer to a proceeding where its hearing has commenced and proceeded to such an extent that it will be inconvenient to have it reheard*. In this case when the four matters were called up for hearing Gopal Sri Ram JCA recused himself from hearing the proceedings on his own accord after encl 42(a) was withdrawn. At that stage it cannot be said that the proceedings had commenced for the purpose of s 42(1) of the CJA. The remaining two judges proceeding with the matters in such circumstances offends s 38(1) of the CJA which reads as follows:
>
> > Subject as hereinafter provided, every proceeding in the court of Appeal shall be heard and disposed of by three judges or such greater uneven number of judges as the President may in any particular case determine.
>
> As s 42(1) of the CJA is inapplicable to the circumstances of this case the proceedings ought to have been heard before a full quorum within the meaning of s 38(1) of CJA. Alternatively the application for the interim orders ought to have been heard by one of the two judges sitting as a single judge. Neither course was adopted. The result is that the continuation of the hearing of the proceedings by the remaining two judges cannot be said to be valid'. (Emphasis added.)

[23] Exchange those sections referred to by the learned judge with ss 74(1) and 78(1) of the CJA and his view becomes very relevant in the present case. The only difference is that in this case the application for recusal was made by learned counsel for Raja Petra. In *Wan Khairani* the presiding judge voluntarily recused himself. In our view the difference is immaterial. The consequence is the same. One less judge in the panel. Hence, except for the minor difference the events which transpired in both cases are almost identical.

[24] The question therefore in this case is whether the hearing of the recusal

application by the two-member panel offended s 74(1) of the CJA. If we were to follow the view of Augustine Paul FCJ in *Wan Khairani* the hearing did offend the provision. When adjournment was allowed the proceeding had not come to a stage where 'its hearing has commenced and proceeded to such an extent that it will be inconvenient to have it reheard'. In our view this approach makes sense. We have no hesitation in adopting it in coming to our decision in this case. In fact even in trial cases it was held that 'in the context the commencement of trial must mean the commencement of the examination, cross-examination and re-examination of one or more witnesses' (see *Savrimuthu v Public Prosecutor* [1987] 2 MLJ 173.

[25] Admittedly any grant or refusal of adjournment involves an exercise of discretion. In this case a short adjournment was granted by the three-member panel. However, in our view merely considering an application for an adjournment cannot be said to have set the substantive matter in motion. In *Wan Khairani* the presiding judge recused himself when the four matters were called up. In the present case an application to have Augustine Paul FCJ recused was made when the matter was called up. In *Wan Khairani* it was the view of Augustine Paul JCA (as he then was) that at 'that stage it cannot be said that the proceedings had commenced for the purpose of s 42(1) of the CJA. The remaining two judges proceeding with the matters in such circumstances offends s 38(1) of the CJA'. We find no difference in the present case. It cannot be said that the proceeding had commenced so as to justify the invocation of s 78(1) of the CJA merely because an adjournment was allowed to enable a formal application for recusal to be filed.

[26] Accordingly, when the two-member panel proceeded to hear the recusal application, s 74(1) of the CJA was offended. Unlike in *Wan Khairani* where the majority judgment was dealing with an order which even a single judge could hear, the present case did not have that option.

[27] It is therefore our considered opinion that there was a quorum failure. This is an appropriate case for the exercise of the inherent power of this court as crystallised in r 137. Thus, the decision to dismiss the application for recusal and the order made to invite Augustine Paul FCJ to take his seat should be set aside.

[28] In view of our foregoing conclusion it is not necessary for us to consider the other arguments advanced by both sides. Suffice to say that whichever way we would have ruled on those issues it would not have made us change our decision.

[29] Finally, as was done in *Chia Yan Tek* we would allow encl 2(a) to the extent that we set aside the decision and order of the two-member panel in

respect of the application to recuse Augustine Paul FCJ (encl 17(a). It follows that the other decisions and orders in relation to encls 12(a), 13(a) and 21(a) made subsequent to the impugned decision and order are hereby set aside as well. The Federal Court Registry will fix a new date for the rehearing of these applications.

Order accordingly.

Reported by Ashok Kumar